IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1753 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE P.B.MAJMUDAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GOSWAMINI MALTIVAHUJI MAHARAJ

Versus

GOSWAMI NATWARGOPALJI MAHARAJ

Appearance:

MR SURESH M SHAH for Petitioner

MR MK VAKHARIA for Respondent No. 1

NOTICE SERVED for Respondent No. 2, 4, 5

NOTICE SERVED BY DS for Respondent No. 3

CORAM : MR.JUSTICE P.B.MAJMUDAR

Date of decision: 19/01/2001

ORAL JUDGEMENT

#. The petitioner herein has instituted the proceedings for obtaining the probate of Will which is at Mark 138/8

on the record of the trial court. Initially, the petitioner had filed Civil Misc.Application No.11/92 for obtaining the probate of the Will and after it became contentious proceedings, the same was registered as Regular Civil Suit No.13/94. The said suit is pending in the court of the Civil Judge (Senior Division), Porbandar. During the course of the evidence in the said proceedings, the plaintiff produced the original Will at Mark - 138/8. The advocate of the plaintiff requested the court to exhibit the said Will. The said request was resisted by the defendants on the ground that the said document cannot be admitted in evidence and that it cannot be exhibited. On behalf of the plaintiff, it was stated that, one attesting witness in the matter Gopaljibhai Zinabhai is being examined at Exh.180. According to Mr.S.M.Shah, the learned trial Judge, however, rejected the prayer made on behalf of the plaintiff for exhibiting the document on the ground that the document in question, that is, Will must be attested by two or more witnesses and that, looking to Mark-138/8 only signature of one attesting witness is there and second number is kept blank. Considering various provisions of the Evidence Act, the trial court came to the conclusion that the plaintiff has failed to prove the execution of the document at Exh.138/8 as the said Will is not duly executed and attested and the plaintiff failed to prove the execution as required by section 67 of the Evidence Act and as per the provisions of section 63 of the Indian Succession Act. The learned trial Judge, therefore, refused to admit the said document in evidence. The aforesaid order is impugned at the instance of the original plaintiff by way of this revision application.

#. At the time of hearing of this revision application, Mr.S.M.Shah, learned advocate for the petitioner argued that the learned trial Judge has committed an error of jurisdiction in passing the impugned order. According to him, the proceeding is for obtaining the probate and if the basic document is not admitted in evidence then practically the suit is over at this stage and nothing further will require to be argued in the suit. According to him, the evidence of the plaintiff is still in progress. In his submission, therefore, the learned trial Judge at the interim stage, could not have passed such order. He submitted that, virtually the suit is dismissed before the trial is over.

#. Against the aforesaid arguments, Mr.Vakharia for the respondents argued that this being the revision application under section 115 of the Civil Procedure

Code, this court may not interfere with the order of the learned trial Judge as it cannot be said that the order of the trial court is without jurisdiction. He alternatively submitted that, in any case, the document cannot be ordered to be exhibited and it may remain on record as Mark and ultimately after the evidence of the parties are over, the court may consider whether the same is required to be exhibited or not as per the evidence on record.

#. After hearing both the sides, I am of the opinion that the learned trial Judge has committed an error in going in such minute details of the evidence at this stage. Virtually, the trial court has consider the entire evidence as if the court is disposing of the entire suit. Under these circumstances, I would like to accept the say of Mr.Vakharia to the effect that the document in question may be kept on record as Mark without exhibiting the same and at the time of concluding the trial and as per the evidence available at that stage, the court may consider whether the aforesaid document should be exhibited or not. At this stage, when the suit is pending, if the document in question is not allowed to be kept on record, ultimately, this being a basic document, it may result into conclusion of the suit itself at the interlocutory stage.

#. Under the aforesaid circumstances, The impugned order below Exh.180 passed in Regular Civil Suit No.23/94 is set aside. The document at Mark 138/8 will remain on record as Mark and the same may not be exhibited at this stage and at the time of deciding the suit, the court may consider whether the document in question is required to be considered or not. The observations made by the trial court in the impugned judgment may not be taken into consideration at that time. The question of exhibiting the said document may be decided at the later stage when the parties led their evidence in the suit.

#. In view of the aforesaid, this civil revision application is partly allowed. It is clarified that the document in question will remain on record as Mark and after the evidence is laid down by both the sides at subsequent stage, the court will consider the question about the document whether it is proved or not and whether it is required to be exhibited or not. For that purpose, the plaintiff will be at liberty to lead the evidence with reference to the said document. In short, therefore, the question is kept open.

#. It is clarified that the observations made in the

impugned order by the learned trial Judge or by this court in the present revision application may not be taken into consideration at the time when the question about exhibiting the document arise. It is clarified that, this court has not expressed any opinion on merits one way or other, whether the document in question is required to be exhibited or not, ultimately it is for the learned trial Judge to decide the same at the appropriate stage as stated hereinabove after considering the evidence on record as well as after considering the provisions of law.

#. In view of the aforesaid discussions, Rule is made absolute with no order as to costs.

(P.B.Majmudar,J)
(pathan)